No. 14554

United States Court of Appeals
for the Ninth Circuit

AERIAL LUMBER COMPANY, Appellant

v.

UNITED STATES OF AMERICA, Appellee

BRIEF OF APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *District Judge*

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STATEMENT OF PLEADINGS AND JURISDICTION

The Appellee, United States of America, brought this action in the United States District Court for the Western District of Washington, Northern Ddvision, to recover damages consisting of loss of profit as a result of the failure of the appellant to complete the purchase of certain dwelling units according to the parties' contract. The complaint alleged (Tr. 3) and the answer admitted (Tr. 5) that jurisdiction was conferred on that court under Title 28 U.S.C.A., Section 1345.

After trial on the merits, on August 16, 1954 the District Court entered judgment against the appellant for the amount prayed for in the complaint. (Tr. 10). No-

tice of appeal was filed September 14, 1954 (Tr. 11), and Cost Bond on Appeal by Cash Deposit was filed September 22, 1954 (Tr. 11, 12). Jurisdiction to review the judgment is conferred by Title 28 U.S.C.A., Sections 1291 and 1294 and by Federal Rules of Civil Procedure, Rule 73.

No opinion was filed by the District Court.

STATEMENT OF THE CASE

This is an action by Appellee, the United States of America, against Appellant, Aerial Lumber Company, a corporation, to recover the difference between the amount which the Appellant bid for four dwelling units, a total bid of $5,100.00, and the amount for which the Appellee later sold the same units, $2,075.50 (the difference being adjusted by crediting deposits of $355.00 and debiting costs of resale of $54.20). The Appellee recovered judgment in the United States District Court for the computed difference, $2,723.70 and interest. (Tr. 10.)

Two separate bid transactions are involved, but, so far as is material to this action, the language of the separate Invitations to Bid, Offer and Acceptance of Offer and Statement and Certificate of Award is the same.

The Invitation to Bid (Tr. 27) is a two-page document describing "Temporary-Row Houses" to be sold by the Housing and Home Finance Agency, Public Housing Administration. It requests sealed bids from

persons in the category of Appellant, a non-priority holder. Paragraph 5 provided for a deposit securing the offer, stating as follows:

> "5. All offers except those from federal, state or local government bodies shall be accompanied by a deposit securing the offer. Said deposit shall be in the form of a certified or cashier's check or money order payable to the Housing Authority of the City of Seattle and shall be in the amount of five (5) per cent of the bid up to $10,000 plus two (2) per cent of any amount in excess of $10,000. The amount of the deposits made by successful bidders in accordance with this Paragraph shall be applied against the purchase price. When an offer is accepted, the unsuccessful bidders will so be notified and the checks or money orders of all unsuccessful bidders shall be immediately returned to them. Checks or money orders may be held by the Public Housing Administration without deposit and at the bidder's risk until the successful bidders are selected."

Paragraph 4 provides for a Performance Bond, referring to Paragraph 2 of the General Conditions.

The General Conditions (Tr. 30) were made a part of the Invitation to Bid by reference (Paragraph 1). There are fourteen paragraphs covering the subject matter, two of which deal with the possibility of the bidder failing to complete the work. One is as follows:

> "2. Performance Security. The Purchaser shall

within 5 days of the delivery to the Purchaser of an executed copy of the contract supply (in addition to payment in full of the contract price) performance security in the form of a certified check, cashier's check or United States Post Office Money Order payable to the Housing Authority of the City of Seattle in the amount required under Section 4 of the Invitation to Bid, or shall supply a performance bond in a like amount. The Purchaser is liable for any expense incurred by the Government as a result of his failure to abide by the terms of this sale, including the removal of the units sold hereunder within the time stated herein and leaving the site in a satisfactory condition. The Purchaser shall be liable for the full amount of damages determined by the Contracting Officer to have been occasioned by his failure to comply with provisions of this sale, whether or not such damages are secured by the performance security."

Upon a form apparently furnished for the purpose, entitled "Offer and Acceptance of Offer," the Appellant offered to purchase certain units. The printed portions of two paragraphs referred to the General Conditions as follows (Tr. 26):

"2. The Purchaser offers and agrees to purchase from the Seller the property set forth and described in the Invitation to Bid attached to the General Conditions, such offer being governed by and subject to the General Conditions covering the sale of such property, at the following purchase price:

Building Number:	10	$1,200.00
	20	1,600.00
	24	800.00

"4. This offer shall be binding upon the purchaser, his (its) successors and assigns in the manner and for the period, and may be accepted by the Seller, all as set forth in the General Conditions and the Invitation to Bid."

Paragraph 3 of this document provided for payment of money to be "held and applied as set forth in the Invitation to Bid."

The Appellant's bids to purchase offered to pay more money for four units than other bidders offered to pay. The Contracting Officer for the Government, M. C. Redman, thereafter issued the "Statement and Certificate of Award" in regard to the four units (Trs. 22-36). No formal contract document was signed by both of the contracting parties (Tr. 54).

As a result of the failure of the Defendant to go forward to perform the work and pay the price, the four units were rebid, the Appellee receiving and accepting offers from others to pay less than Appellant had offered. The units were, therefore, sold for these lower prices and Exhibit 6 shows the computation of the amount which the Appellee claims due (Tr. 62).

QUESTIONS INVOLVED

1. Is the Government entitled to recover loss of profit (the difference between the purchase price bid by appellant for the dwelling units and the lower price for which they were sold) as a result of the failure of the appellant to pay the purchase price and commence to remove the property in light of the provision of paragraph 2 of the General Conditions stating: "the Purchaser is liable for any expense incurred by the Government as a result of his failure to abide by the terms of this sale . . .?"

2. Where the contract provides "The Purchaser shall be liable for the full amount of damages determined by the Contracting Officer to have been occasioned by his failure to comply with the provisions of this sale . . . ," may the seller recover any damages without having proved a determination of damages by such Officer?

3. Did the trial Court commit prejudicial error in admitting generally into evidence a letter from the Comptroller General of the United States addressed to appellant, entitled "Certificate of Settlement," purporting to settle the claim of the United States against the appellant and fixing the amount "due"?

SPECIFICATIONS OF ERROR

1. The Trial Court erred in entering Finding of Fact IV (Tr. 8) in which the Court found the damage to the Appellee in the principle sum of $2,723.70, plus interest.

2. The Trial Court erred in entering Conclusions of Law I and II (Tr. 9) in which the Court concluded that the Appellee was entitled to recover judgment against Appellant on account of the contract in the principle sum of $2,723.70, plus interest and to recover judgment for costs and disbursements.

3. The Trial Court erred in entering judgment against the Appellant in the sum of $2,723.70, together with interest and costs, or in any sum.

4. The Trial Court erred in admitting Exhibit 6 generally into evidence (Tr. 60) over objection by Appellant (Tr. 59) as to its offer on a general basis in that the words "defaulted," "loss," "due," "settled," etc., were conclusions of the General Accounting Office and not binding upon the Trial Court nor upon the Appellant. Exhibit 6 (Tr. 60-62) is a letter from the Comptroller General of the United States to Appellant entitled "Certificate of Settlement" containing the statement of the writer that he had settled the claims of the United States for loss sustained by reason of debtor's default, finding $2,723.70 due, reciting that the lebtor agreed to purchase certain buildings but defaulted un-

der its contracts and upon resale there was a loss to the Government. The letter contained a statement of the various bids, costs of resale and computation of losses claimed.

SUMMARY OF ARGUMENT

Specifications of Error 1, 2 and 3 will be argued together. The arguments under Headings I and II, treating respectively with questions 1 and 2 set forth above, will each involve the error of the Trial Court in finding compensable damage to the Appellee and in entering Conclusions of Law and Judgment in Appellee's favor.

Specification 4 will be argued under Heading III.

Under Heading I, it will be demonstrated that the law permits parties to a contract to specify the limit of each's liability in the event of breach; that in the contract between these parties, the liability of Appellant in the event of its failure to comply with the terms of the contract was limited to expense incurred by the Appellee; and that no item of expense being included in the $2,723.70 sought by the Appellee, no judgment should have been rendered against Appellant in this case.

Under Heading II, it will be urged that as there was no evidence that the Contracting Officer of the Housing and Home Finance Agency, Public Housing Ad-

ministration, had made a determination of damages, the Appellee was not entitled to any judgment for damages occasioned by the failure of Appellant to comply with the provisions of the sale by paying the purchase price and removing the dwelling units. From Appellant's standpoint, its liability for damages pursuant to the contract terms was conditioned upon that Officer making a determination which would be binding upon both parties as to questions of fact.

Under Heading III, the Appellant will assert the error in admitting Exhibit 6 into evidence without restriction as to purpose and effect. Other than as a demand, it does not constitute a substitute for a determination of a Contracting Officer. It was irrelevant and immaterial in so far as it purported to state any conclusions of fact or law.

ARGUMENT

I. A—The court enforces the agreement the parties made.

The relationship between the parties in each of the two purchase transactions was created by the following documents: 1—Statement and Certificate of Award (Tr. 22, 36); 2—Offer and Acceptance of Offer (Tr. 25, 39); 3—Invitation to Bid (Tr. 27, 41); 4—General Conditions (Tr. 30). Paragraphs 2 and 4 of the Offer and Acceptance of Offer made it subject to the General Conditions, and the Invitation to Bid (Tr. 26, 40) re-

cited that copies of the General Conditions had been furnished the Appellant before the offer was made (Tr. 25, 39).

In the General Conditions, the Appellant was informed that it must pay the full purchase price and furnish a performance bond. Appellant was informed by the "Scope" (of the work) (Paragraph 3, Tr. 30) of the various details it must provide for or guard against in the physical process of getting what it bought. Other paragraphs of the Conditions contained standard clauses in regard to relationship of third parties to Appellant.

In addition to telling Appellant what it must do or refrain from doing, Paragraph 2 of the Conditions told Appellant, in plain, non-technical language, what would happen if it failed to act or acted in violation of the terms in the following language:

> "The purchaser is liable for *any expense* incurred by the Government as a result of his failure to abide by the terms of this sale, including the removal of the units sold hereunder within the time stated herein and leaving the site in a satisfactory condition." (Tr. 30)

The Appellee claimed in Paragraph V of the Complaint, in effect, that Appellant had utterly failed to abide by the terms of the sale (Tr. 4) and the trial court so found (Findings of Fact III, Tr. 8). But the contract told Appellant that even if it so failed, it would

only be compelled to pay "any expense." All elements of the judgment granted to Appellee of $2,723.70 which fail to fall within the definition of "expense" are unwarranted in law.

In the construction of written contracts, it is a standard rule of interpretation that where the parties have treated of a subject, the scope of their agreement in regard to it must be ascertained from the instrument.

In 12 *Am. Jur., Contracts,* p. 749, et seq, Sec. 228, it is said:

> "§ 228. No Right to Make Agreement for Parties. Interpretation of an agreement does not include its modification or the creation of a new or different one. A court is not at liberty to revise an agreement while professing to construe it. Nor does it have the right to make a contract for the parties—that is, a contract different from that actually entered into by them. Neither abstract justice nor the rule of liberal construction justifies the creation of a contract for the parties which they did not make themselves or the imposition upon one party to a contract of an obligation not assumed. Courts cannot make for the parties better agreements than they themselves have been satisfied to make or rewrite contracts because they operate harshly or inequitably as to one of the parties. If the parties to a contract adopt a provision which contravenes no principle of public policy and contains no element of ambiguity, the courts have no right, by a process of interpretation, to re-

lieve one of them from disadvantageous terms which he has actually made.

There is no right to interpret the agreement as meaning something different from what the parties intended as expressed by the language they saw fit to employ. The court is not at liberty, either to disregard words used by the parties, descriptive of the subject matter or of any material incident, or to insert words which the parties have not made use of. It cannot reject what the parties inserted, unless it is repugnant to some other part of the instrument. The court can properly interpret a contract only as the parties make it, and cannot substitute words for those used by them. Neither a court of law nor a court of equity can interpolate in a contract what the contract does not contain.

The court has no power by interpretation to engraft on a contract a limitation inconsistent with the apparent object of the parties. It cannot interpolate a stipulation or words into a contract where such are not implied by anything that appears on the face of the contract and where the surrounding circumstances do not authorize or require a construction of the contract that would import such stipulation or words into it. It can go no further than to collect the intention from the language employed as applied to the subject matter in view of the surrounding circumstances."

By very plain language, the form prepared by the Appellee fully covered what the Appellant might expect as consequences in the event it failed to abide by the terms.

B—"Expense" means money paid out but does not include loss of profit.

"Expense" is defined in 35 *C.J.S.* 207 as follows:

> "EXPENSE or EXPENSES." The substantive form of the verb "expend" having its origin in the Latin word "expendere," "ex" meaning "out," and "Pendere" meaning "to weigh." While the word is one of somewhat varying significance, depending on the connection in which it is used, its meanings, both in popular speech and law, are well established, although the two may differ; and it has been variously defined as the act of expending; disbursement, or expenditure; disbursement or money, or the laying out or expending of money or other resources; an actual and honest disbursement; but the term is not limited to expenditure of money, or to pecuniary expense, for it may mean the employment and consumption of time, labor, strength, or thought; the habit of expending; also that which is spent; charge, as expenses for the journey, or cost; money expended or actually paid out; outlay; the payment of a price; and also burden of expenditure, consumption, or loss, as at the expense of health or time."

See, also, *Williams v. United States,* 12 Ct. Cl. 192 @ 199 where it is said:

> "But the word 'expense,' both in its etymology and ordinary use, indicates expenditure, outlay, the distribution of money, the payment of a price."

The definitions above, and the common understanding of the word, means paying out something but does

not go so far as to include an item of failure to receive —loss of profit.

None of the items of the judgment sought and granted against Appellant include a "paying out." The Appellant deposited a total of $355.00 as bid deposit (Tr. 26, 40, 62). The Appellee "paid out" in cost of resale $54.20 (Tr. 62). All other items of the judgment represent the difference between the amount of Appellant's bid and the amount received upon subsequent resale, or "loss of profit."

C—The provision of a contract limiting liability of a defaulting party will be enforced.

The text writers and the courts have long and universally recognized the right of parties to a contract to limit the liability of a defaulting party to a measure of damages amounting to less than the damages or relief which the usual standards of law would otherwise afford. In this regard, the *Restatement of Contracts*, Vol. 1, Sec. 339 (g) states: (p. 554)

> "An agreement limiting the amount of damages recoverable for breach is not an agreement to pay either liquidated damages or a penalty. Except in the case of certain public service contracts, the contracting parties can by agreement limit their liability in damages to a specific amount, either at the time of making their principal contract, or subsequently thereto. Such a contract does not purport to make an estimate of the harm caused by a

breach; nor is its purpose to operate in terrorem to induce performance."

Corbin on Contracts states in Vol 5, p. 323, Sec. 1068:

> "The courts see no harm in express agreements limiting the damages to be recovered for breach of contract. Public policy may forbid the enforcement of penalties against a defendant; but it does not forbid the enforcement of a limitation in his favor. Parties sometimes make agreements and expressly provide that they shall not be enforceable at all, by any remedy, legal or equitable."

We find *Williston on Contracts,* Vol. 3, p. 2197, Sec. 781A, treating the subject in the following language:

> "Contractual limitation of liability to an agreed maximum must be distinguished from a penalty or liquidated damages, though every valid agreement for liquidated damages operates as a kind of limitation. Aside from certain restrictions in the field of public utility law, chiefly relating to common carriers, if the agreed amount to which liability is limited is something more than a merely nominal sum, the validity of the provision has long been recognized. It is neither a penalty in that it does not normally operate in terrorem to induce proper performance nor is it of the nature of liquidated damages since it does not purport to be a pre-estimate of probable damages resulting from a breach.

The Supreme Court of the United States has applied the principle of limitation of liability in connection

with a claim by the United States against a contractor for per diem liquidated damages upon delay or failure to complete the work. In *Stone, Sand & Gravel Co. v. United States,* 234 U.S. 263, 34 S Ct. 851, 58 L Ed. 1305, the contractor who had agreed to remove earth for payment of 8.49 cents per cubic yard did not commence the work on time. Formal notice was given it that in accordance with the contract, the contract was annulled. The work was relet at a price to the Government of 12.4 cents per cubic yard. The action was for the damages measured by the difference in the cost to the Government. The contract provided in Clause A that if the contractor failed to commence the work, the contract could be annulled "and upon giving of notice all money or reserved percentage due" would be forfeited. In Clause B, it was provided that in case of failure to complete, in addition to forfeiture of monies due, the United States had the right to recover sums in excess of contract price required to complete the work. The Court held the United States not entitled to recover. In answer to the contention of the Government that it had an inherent right to annul the contract, apart from Clause A, upon the failure of the contractor to commence and upon annulment, the right to recover all damages followed, the Court said:

> "But we need not deal with the consequences as if Clause A had been omitted. The right might have been inherent, or not so vital as to justify the vigor of annulment. Both parties elected to deal

with the matter by express stipulation and that should be and is the end of it."

See, also, *United States v. O'Brien,* 220 U. S. 321, 31 S. Ct. 406, 55 L. Ed. 481, where, in considering the same contract as in the *Stone Case,* the court limited the recovery of the United States to that provided by the contract with the admonition that:

> "If the United States wants more, it must say so in plainer words."

The court has stated the rule in *United States v. Harris,* 10 F. (2d) 268 (CCA9, 1938), a case involving the other side of the problem, where the United States recovered as provided by the agreement, saying: (p. 278)

> "It is well settled that parties to a contract may themselves make provision for the measurement of damages in the event of a breach. Such provision, if not unreasonable, will be given effect."

In *American Surety Co. of New York v. Woods,* 105 F. 741 (CCA5, 1901) recovery of damages for failure to continue with work on a sewer job was denied where the Sewerage District went into the hands of a receiver and did not incur expense in finishing the job. The contract had provided that upon delay by contractor, the company could finish the job and the contractor would pay the difference between the contract price and the excess cost to the Sewerage Company.

In *Jewett, Bigelow & Brooks v. Detroit Edison Co.,* 274 F. 30 (CCA6, 1921) (cert. den. 257 U.S. 641, 66 L.

Ed. 411) the contract provided that seller would pay 20 cents per ton for each ton short in shipments. The buyer had recovered a judgment below substantially greater for failure to ship. In reversing, the court said: (p. 38)

> "A court will not disregard the express provisions of a contract in reference to liquidated damages upon the theory that the amount named is too small, but rather only for the reason that the amount named is so extravagant and excessive as to indicate that it was intended as a penalty and not compensation, or that the amount was so excessive as to imply fraud, mistake, circumvention or oppression."

The court noted that the buyer was seeking to avoid provisions of its own contract form.

The Supreme Court of the State of Washington applied the rule that parties are limited to recovery provided by the contract in *Smith v. Lambert Transfer Co.*, 109 Wash. 529, 187 P. 362.

For factual situations similar to the present case, where the court held the defaulting party to have limited his liability, see *Mooney v. Van Kleek Mortgage Co.*, 75 Colo. 173, 225 P. 210, and *Catterlin v. Voney*, 177 F. 527 (D. C. Ore. 1910).

The language of the General Conditions includes "property available for sale" (Paragraph 1, Tr. 30), the "Purchaser" shall do or not do (Paragraph 2, 3, 4, Tr. 30, 31, 32). The Offer and Acceptance of Offer re-

fers to Appellant as "Purchaser" (Tr. 25). The Transaction was clearly that of a sale of property with other elements incidental to removing that property.

In the law of sales, parties have uniformly been permitted to limit their liability under the general law by appropriate language in the contract. For example, in *Tucker v. Traylor Engineering and Mfg. Co.,* 48 F. (2d) 783 (CCA 10, 1931) the court held it had no power to enlarge on the terms of an agreement restricting the obligation of the seller in the event of a defect, to repair or replacement for one year.

The last sentence of Paragraph 2 of the General Conditions, to-wit: (Tr. 30)

> "The purchaser shall be liable for the full amount of damages determined by the Contracting Officer to have been occasioned by his failure to comply withp rovisions of this sale . . ."

does not enlarge the liability of the Appellant. If it can be said that the word "damage" is more general than the word "expense," including within its meaning loss of profit, the doctrine of ejusdem generis will limit its meaning to the enumeration of the specific preceding it.

"Damages" does not have a general meaning which will enlarge the stipulation here of relief to the Appellee as being confined to what it paid out. "Damages" means compensation for a breach, measured in terms of the contract. *George W. Blanchard & Sons Co. v.*

American Realty Co., 115 A. 4, 6, 80 N.H. 161. See, also, 25 *C.J.S.* 452 defining damages as "the total amount which plaintiff may recover under correct principles of law . . ."

This last sentence, obviously, was placed in the paragraph to provide for the usual method found in many government contracts of appointing a contracting officer as an arbitrator of questions of fact.

In construing the relationship of the two sentences, the construction should be more strongly against the Appellee who prepared and furnished these forms. *Texas Pacific Ry Co. v. Reiss*, 183 U. S. 626, 22 S. Ct. 253, 46 L. Ed. 358.

The evidence in the case shows expense or money paid out by Appellee of $54.20 and payment by Appellant of $355.00 as bid deposit. The evidence fails to show any further money paid out. Appellee is not entitled to judgment in any amount because Appellant's limited liability has been more than satisfied.

II. In failing to prove a determination by the Contracting Officer of damages, Appellee failed in its proof of a right to recover any amount.

The court found the "damage" to Appellee to be $2,723.70, the principal of the judgment entered (Tr. S. 10). However, there was no evidence submitted of a determination, with or without a hearing upon notice,

of damages by the Contracting Officer as required by Paragraph 2 of the General Conditions (Tr. 30).

This provision, in effect a sort of arbitration, is binding on all parties. *United States v. Moorman,* 338 U.S. 456, 70 S. Ct. 288, 94 L. Ed. 256.

Where a contract provides for the submission of questions of fact to an arbitrator, proof of such submission is a nceessary condition precedent to the bringing of suit against the United States. *United States v. Holpuch,* 328 U. S. 234, 66 S. Ct. 1000, 90 L. Ed. 1192.

It would, therefore, appear that in the interest of mutuality of contracts, the same rule should apply to the United States as plaintiff, the alternative being that the sentence should be totally disregarded.

Such determination would not be binding on the parties in regard to matters of law. *Gemsco Inc. v. United States* (1950), 115 Ct. Cl. 209, and it is Appellant's contention that by law under the contract only out-of-pocket items may be considered as damage. It may be that such an interpretation was made by the Contracting Officer and overruled by the General Accounting Office. In one particular the Contracting Officer may well have arrived at a different conclusion because of his familiarity with bids in these matters. While re-reading the Appellant's offer for the Everett unit (Tr. 39) counsel for the first time noticed that

the language of the bid was "$250.00 per unit" and "Preferable No. 5 or 3 or 4 or 6 or 7." At the trial, counsel not having noted this language but noting the language of the award (Tr. 38) stipulated that "if the defendant is liable, the defendant has no quarrel with the accuracy of the figures or statement made in the certificate of settlement." Any issue of amount of this judgment is not in this case at this time, but the necessity of the Government proceeding with a timely determination by the Contracting Officer, upon notice, in an orderly fashion while the facts are fresh in the minds of the participants becomes apparent.

III. The letter of the Comptroller General was incompetent to prove any element of Appellee's case.

Plaintiff's Exhibit 6 was admitted in evidence generally over objection by Appellant (Tr. 59, 60). Its effect upon the court is unknown but it was inadmissable for any purpose other than possibly demand if demand was necessary. Certain figures were competent pursuant to stipulation (Tr. 18).

Obviously, the action of the General Accounting Office can have no bearing on the rights of the parties to the contract in suit. It is not a substitute for a determination by the Contracting Officer, an officer and employee of the Housing & Home Finance Agency, Publice Housing Administration (Tr. 22-24).

CONCLUSION

When the time for entering upon performance arrived, the Appellant had two choices. Those choices were (1) to enter upon performance or (2) fail to do so and suffer what consequences the contract might impose. In lay English, the contract spelled out suffering to the extent of repaying the Government what the latter paid out. The Appellant chose course No. 2 and is to be morally blamed no more than the buyer of real estate who forfeits his earnest money rather than move into the house.

The law, by virtue of the doctrine of limitation of liability, conforms with what we describe as lay English and the Appellee's judgment for loss of profit cannot stand.

Respectfully submitted,

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